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TCEQ Could Provide Water by Declining to Enforce Senior Rights

 [Jeremy Brown](#)  June 28, 2013

A state district court judge recently invalidated a Texas Commission on Environmental Quality (TCEQ) rule allowing the agency, during droughts or other emergency water shortages, to enforce senior water rights by suspending junior water rights. The rub was that the agency could, in the process, exempt preferred junior water rights holders such as municipalities and electric generators for unspecified public health and safety reasons.

The Texas Farm Bureau sued. In response to motions for summary judgment, Travis County District Court Judge Scott Jenkins ruled against the agency, finding that the rule exceeded the agency's statutory mandate. At a commissioners' meeting last week, TCEQ staff and the commissioners themselves hinted that they might appeal but didn't expressly commit to a course of action.

If the agency decides not to appeal, or if a higher court upholds Judge Jenkins' decision, the drought rule as currently formulated will be dead. But the issues the drought rule was designed to address will remain. The state will continue to slog through its drought and, without enough water to go around, water appropriators within certain basins may find themselves in conflict.

In theory, the priority doctrine could resolve these conflicts. But the doctrine has historically acted as more of an intellectual solution to competing demands than an operational one, and the priority of established water rights may not reflect the state's policy priorities. Put more bluntly, TCEQ and the politicians who oversee it may want municipalities and others to receive finite water supplies even if those supplies come at the expense of more senior agricultural rights holders.

How, then, if TCEQ cannot exempt preferred junior appropriators from suspension orders, and certain preferred junior appropriators cannot meet all their needs through water markets, can the agency ensure that the preferred junior appropriators do not succumb to drought-related public health crisis?

(As a sidenote: "Crisis" is a relative term but one TCEQ has repeatedly used. The same goes for similar terms like "catastrophe" and "emergency." As illustrations of hypothetical public health catastrophes, TCEQ has described domestic users without enough water to drink or bathe. But suspending municipal water rights will not automatically bring about dire outcomes. As drought contingency plans document, we use water for many purposes, some more essential than others, and we can reign in business-as-usual practices – fountains, swimming pools, lawns – without turning off the taps completely.)

One option would be for TCEQ to refrain from enforcing water rights.

Under Texas law, water is state-owned. Water users may acquire rights to that water. Water Code § 11.022. But the state continues to hold the water in trust, and appropriators can use the water only as expressly authorized by law. § 11.0235(a). No statute requires TCEQ to enforce the water rights it grants.

The Texas Water Code establishes the priority system at Section 11.027: "As between appropriators, the first in time is the first in right." It does not specify how this principle will be enforced.

Other sections of the Water Code give TCEQ broad enforcement authority. The sections empower the agency to protect senior water rights from junior appropriators, but they do not require it to do so. *E.g.*, §§ 7.002 ("[t]he commission *may* initiate an action under this chapter to enforce provisions of this code"); 7.032(a) ("[t]he executive director may enforce a commission rule or a provision of a permit issued by the commission by injunction or other appropriate remedy."

In fact, TCEQ promulgated the invalidated drought rule last year, at the direction of the newly enacted § 11.053. That section, in turn, was passed as part of the agency's 2011 Sunset legislation, in response to an issue [raised](#) by the Sunset Commission: "Although statute is clear about TCEQ's authority to manage water rights, the law is less clear about circumstances in which TCEQ can actively curtail the right to divert state water to protect senior rights and ensure adequate water supplies are available during water shortages and emergencies."

This statement suggests that, as of 2011, there was doubt about whether TCEQ had authority not just to "ensure adequate water supplies" (presumably by exempting preferred junior rights holders) but also to "protect senior rights."

Section 11.053 clarifies that TCEQ does have this authority – and that TCEQ is not required to use that authority. "The executive director by order *may*, in accordance with the priority of water rights established by Section 11.027: (1) temporarily suspend the right of any person who holds a water right to use the water; and (2) temporarily adjust the diversions of water by water rights holders."

Given this sort of discretion, TCEQ could simply decide not to enforce rights – either across-the-board or selectively, on the basis of whichever criteria the agency deems appropriate. Sitting on the sidelines could result in inconvenience to senior rights holders who would have otherwise saved themselves effort and expense by effectively outsourcing their enforcement to a government agency. But that'd make it no less legal.

(The most notable exception to the above is Section 11.041, which requires the agency to act on a petition from an appropriator showing that a water rights holder – not necessarily an appropriator – is entitled to receive certain water, willing to pay for that water, and being deprived of that water by a party that has the water had contracted to provide it. This statute is not an all-purpose enforcement requirement, however. It enforces contract rights rather than appropriative rights and wouldn't obligate the agency to act when a senior appropriator makes a call.)




A senior appropriator can enforce its water rights itself, through a civil action. § 11.0841(a) ("Nothing in this chapter affects the right of any private corporation, individual, or political subdivision that has a justiciable interest in pursuing any available common-law remedy to enforce a right or to prevent or seek redress or compensation for the violation of a right or otherwise redress an injury.")

Admittedly, private enforcement could prove frustrating. While TCEQ's executive director can simply issue an order suspending water rights, an appropriator would have to file an action seeking to enjoin junior appropriators, likely leading to time-consuming litigation and a cumbersome and contentious fact-finding.

But if TCEQ has the option of using its resources to enforce an appropriation, why should it enforce all senior appropriations, even if it believes that such enforcement will yield bad policy results? Shouldn't it instead mobilize the machinery of state government only to achieve policy priorities (or at the least to protect rather than setback policy priorities)?

This method of selective, policy-guided enforcement would give the agency flexibility to reduce the risk of public health "crises" while respecting the "first in time" priority principle of the Section 11.027.

The downside is that this approach changes the practical, if not the legal, nature of appropriations. Because enforcing the appropriations would become more difficult and uncertain, the value and reliability of the appropriations may change, even if the appropriations maintain their priority. Arguably, these changes could impact the liquidity and transferability of the rights (though all appropriations would be subject to the same changes, perhaps neutralizing their market effects).

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